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AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 815

Case No. 903: CALIN

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Mayer Gabay; Mrs. Deborah Taylor Ashford;

Whereas at the request of Ramona Calin, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended the time-limit for the filing of an application with the Tribunal until 31 March, 30 June, 31 August and 30 November 1994 and 28 February, 31 May, 31 August and 30 November 1995 and 28 February 1996;

Whereas, on 4 January 1996, the Applicant filed an application containing, inter alia, the following pleas:

"... that:

(i) [her] dismissal be reversed as arbitrary;

(ii) the JDC's report be nullified as not supported by the evidence and fatally tainted by violations of due process;

(iii) [she] be awarded the balance of the pay to which she was entitled under the contract of employment ...;

(iv) [she] be awarded damages for the moral injury to her reputation;

(v) the JDC report and the Secretary-General's action increasing the penalty be removed from all files relating to [her];

(vi) there be placed in such files the statement that [her] service to the Organization was satisfactory and that the Organization would consider hiring her again for the same or a similar post;

(vii) an official apology be addressed to [her] in writing for the unjust way in which she has been treated; and

(viii) the circumstances surrounding the violations of due process detailed [in the application] (and particularly the pernicious and vicious vendetta mounted against [her] by the CEO [Chief Executive Officer] of Svay Rieng Province) be investigated."

Whereas the Respondent filed his answer on 3 May 1996;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization, on a short-term contract, as an Information Clerk, at the G-3 level on 11 September 1991, in the Department of Administration and Management. Thereafter, her appointment was extended, and on 2 September 1992, the Applicant was assigned to United Nations Transitional Authority in Cambodia (UNTAC); this assignment was completed on 1 August 1993, and the Applicant returned to Headquarters. By a series of short-term and fixed-term contracts, the Applicant's appointment was extended until 27 September 1993, the date of her separation from service.

On 29 April 1993, a team of trainers from the Electoral Component arrived in Svay Rieng Province, Cambodia, to conduct a training session for presiding officers for the upcoming Cambodian elections. The trainers were Ms. X and the Applicant. They were accompanied by two local staff members, an interpreter and a driver. The group arrived in a Nissan UNTAC vehicle, registration number 452.

On 30 April 1993, Ms. X and the Applicant conducted a training session that lasted the whole day. The following day, they had a short session and then left Svay Rieng for Phnom Penh at approximately 11:15 a.m.

On 1 May 1993, at approximately 12:00 p.m., the District Electoral Supervisor of Svay Rieng Provincial Town reported to the Svay Rieng Provincial Police (Civpol) that about one hour earlier, one of her interpreters and one of the presiding officers reported to her that her portable computer (laptop) was missing from the office. The District Electoral Supervisor suspected that either the trainers, trainees, or others who had been in the electoral office that morning had stolen the laptop. Civpol Headquarters thereupon alerted all District Commanders to look out for UNTAC vehicle no. 452. At the same time, the provincial operations officer alerted the District Commander, Peam Ro District, Prey Veng Province to stop UNTAC vehicle No. 452 at the ferry and to search it.

According to the findings of the Joint Disciplinary Committee (JDC), in a report prepared at a later date, when the car arrived at the ferry, the Peam Ro District Civpol stopped it. They apparently tried to search it, but the Applicant had tried to telephone the people in Svay Rieng and her supervisor in Phnom Penh and allegedly refused to have the car searched. Only after the Applicant failed to reach Svay Rieng and her supervisor in Phnom Penh, did she voluntarily hand over a portable computer (laptop) No. BO - UNCL/486 to Civpol Peam Ro District and a disc. No. BO - UNCL/148.

The Provincial Investigation Group, Svay Rieng Province, prepared a report dated 4 May 1993. The Investigation Group took a statement from the Applicant. In her police statement, the Applicant admitted having taken the laptop for her own use. Ms. X, who accompanied the Applicant in the car, said that she had no idea that their bags contained any laptop until they were intercepted by the police. The police requested the Applicant's permission to

search her house in Phnom Penh, which the Applicant granted. A search was conducted and no other UN property was found.

On 4 May 1993, the Provincial Investigation Group, Svay Rieng Province, after noting that the Applicant admitted taking the laptop for her own use, concluded:

> "It was very clear that [the Applicant] had the intention to steal the laptop for her personnel [sic] use and she knew that the laptop was not hers at all. As she had admitted her mistake, obviously she was guilty."

On 6 May 1993, the Provincial Commander, Civpol, Svay Rieng noted in a memorandum to the Chief of Operations, Civpol Headquarters:

> "[The Applicant] admitted having taken the laptop for her own use and confessed that Miss X who was her companion had no idea of the laptop until she handed it over to Peam Ro Civpol."

On 7 May 1993, the Chief Civilian Personnel Officer stated that "this incident was brought to my attention on 6 May 1993 and I had an interview with [the Applicant] today, 7 May. She admits the allegation. ..."

On 15 May 1993, the Applicant replied to the Provincial Investigation Group's report, "Theft case of a laptop at the Electoral Office, SUG City". She noted that "[f]or the preparation of our training program and materials, computers were an everyday working tool. I inattentively packed the laptop on the back table, together with the left over handouts in one of the two bags we were carrying for transporting material." She explained that "[w]hile in the car travelling towards Phnom Penh, around forty five minutes after our departure from Svay Rieng, I looked for a book in the two rattan bags that we were using to transport materials. I realized that I had a laptop with some yellow label, a mark that I had not seen before. I told my team member that it might be from Svay

Rieng, since by then I was recollecting details from our departure ... I also mentioned to her, that if that [was] the case, I would call ... Phnom Penh, to arrange to send it back. I must admit that I dealt quite lightly with the matter, since I assumed it was not such a big problem." Regarding the search of the car, the Applicant stated as follows: "The car was stopped at a police precinct ... officers ... interviewed us on our identity and asked one of us to take a call, in the office upstairs. ... I volunteered to go and take the call. ... I was told that the call was coming from the Svay Rieng Police. ... I was told that there have been instructions from Svay Rieng Police that our car was supposed to be searched. Officer [A] told me that it was about a missing computer. ... I found the instructions of a car search very strong and I did not understand the reason. I was not asked if we had a laptop. ... I was not able to speak to the Commander ... even if I insisted ardently to talk to the person in charge. I then called my supervisor [in Phnom Penh] to inform her about the incident. She was not to be found. ... I thereafter told Officer [A] that there was no need for the car to be searched, I did have a laptop and I would voluntarily give it to him, which I did. ..." She concluded: "I did not intend to steal the laptop. I did take it, but I have done so mistakenly. When I realized, I was planning to confirm my mistake and return it to Svay Rieng. Unfortunately, it was too late, and the incident proved to have taken a different dimension ..."

On 27 July 1993, the JDC drew the attention of the Secretary-General to the fact that it "found the Civpol investigation report to be substandard and even unprofessional." The JDC adopted its report on 29 July 1993. Its findings and recommendation read as follows:

> "The Committee finds it difficult to understand how [the Applicant] could have inadvertently taken the laptop and not noticed it until a little before being intercepted by the

police. First of all, Ms. [X] states that [neither] a laptop nor any other equipment was part of the training material that was used during this trip. Moreover, Ms. [X] states that no laptop is ever used during her training sessions. What [the Applicant] took was not only the laptop, but also its attachments, namely the adaptor. It does not seem to be difficult to notice a laptop, which has some weight, and an adaptor being packed with all other documents.

[The Applicant], after noticing that there was a laptop among their belongings, did not immediately volunteer the information that she had a laptop that was not hers after being told that the police were instructed to search for a missing laptop (..., 17 May 1993 [the Applicant]'s statements, ...). It was only after she failed to reach the Civpol Commander at Svay Rieng Hqs and [her] supervisor, [in Phnom Penh] that she told Civpol Officer [A] that she had a laptop in her possession.

In her 17 May 1993 statement, [the Applicant] did not deny that she, in her police statement, admitted to hav[ing] stolen the laptop for her personal use. She also did not rebut the police report of 6 May 1993 ... stating that she 'confessed that Ms. [X] ... had no idea of the laptop until she [the Applicant] handed it over to Peam Ro Civpol' (...)

Any aggravating or mitigating factors

It is true that the pre-election period was a stressful one for all UNTAC personnel. Stress may have caused [the Applicant] to not think about whether she had anything to do with an item missing from the Provincial Electoral office, and to not think about getting in touch with Svay Rieng immediately when she noticed a laptop computer in the rattan bags.

This condition, though, does not and should not affect the findings made above. Moreover, all UNTAC personnel were under a lot of stress at the time and the Committee does not find it to be a valid 'excuse'. Personnel joined this peacekeeping mission knowing that it was a hardship mission, and if UNTAC personnel started to be condoned for 'making mistakes' or misconduct during the critical pre-election period, it would be difficult to expect a peacekeeping mission to be carried out in a satisfactory manner.

...

Given the above evidence, findings, and mitigating factors, the Joint Disciplinary Committee recommends to the Secretary-General the following Disciplinary measures against [the Applicant]: (i) written censure by the Secretary-General, and (ii) demotion."

On 24 September 1993, the Under-Secretary-General for Administration and Management transmitted to the Applicant the JDC's report and informed her as follows:

"The Secretary-General ... has taken note of the Committee's finding that you had, as charged, taken United Nations property, namely a laptop computer, on 1 May 1993 from the Svay Rieng Electoral office. He has also taken note of the Committee's discussion of stress as a possible factor in your case and its conclusion that this factor does not excuse your behaviour. He has studied the entire record, including all of the statements made by you and by your counsel on your behalf and has concluded that the evidence corroborates the finding of an intentional, not a negligent, taking of United Nations property.

The Secretary-General has concluded that your conduct constituted a serious violation of the UN standards of conduct and integrity expected of each staff member of the Organization and that this misconduct is incompatible with continued service with the Organization.

In the light of this conclusion, the Secretary-General cannot accept the Committee's recommendation regarding disciplinary measures. Pursuant to his discretionary authority to impose an appropriate disciplinary measure, the Secretary-General has decided to separate you from service for misconduct under staff regulation 10.2, paragraph 1 and staff rule 110.3(a)(vii) with effect from the date you receive this letter. The Secretary-General has also decided that you be paid compensation in lieu of notice in accordance with staff rule 109.3(b)."

On 4 January 1996, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The JDC procedure violated the Applicant's due process rights.

2. The way the Applicant was treated throughout the incident was unjust; the allegation of theft of a laptop was the result of a personal vendetta against the Applicant.

Whereas the Respondent's principal contentions are:

1. The Secretary-General reasonably concluded that the Applicant's acts were intentional. The Secretary-General's rejection of the Applicant's ex post facto explanations did not violate the Applicant's rights.

2. The Applicant's conduct constituted a serious violation of the UN standards of conduct and integrity.

3. The Applicant was accorded due process.

The Tribunal, having deliberated from 7 to 25 July 1997, now pronounces the following judgement:

I. This case comes to the Tribunal pursuant to staff rule 110.4(d), which provides that disciplinary measures recommended by the Joint Disciplinary Committee (JDC) may be appealed directly to the Tribunal. The JDC recommended that the Applicant be censured and demoted for stealing a laptop computer from the Svay Rieng Provincial Electoral Office. The Respondent accepted the findings of the JDC but rejected the recommended penalty, and instead dismissed the Applicant from service.

II. The Tribunal acknowledges that the Secretary-General exercises broad authority and discretion in defining "serious misconduct" under the Staff Rules and Regulations and in determining the proper punishment for such conduct. (Cf. Judgement

No. 582, Neuman (1992), Judgement No. 479, Caine (1990)). The Tribunal limits its review of the Secretary-General's exercise of that discretion to decisions tainted by prejudice or other extraneous considerations, mistake of fact, or lack of due process. (Cf. Judgement No. 510, Camara (1991), Judgement No. 436, Wield (1988), Judgement No. 563, Khan (1992)).

III. The facts of this case are greatly disputed. In reaching his decision to dismiss the Applicant, the Secretary-General placed great emphasis on the findings of the JDC. Therefore, the Tribunal believes that great weight should be placed on the integrity of the process at the JDC hearing. The Tribunal's review leads to the conclusion that the Applicant's due process rights were not respected either in the JDC hearing or during the investigation preceding that hearing. Because the Tribunal finds evidence to suggest prejudice and lack of due process, it now examines the Respondent's determination that the Applicant was guilty of theft of property belonging to the Respondent and therefore deserved dismissal.

IV. The Tribunal first reviews the JDC's opinion that it was "difficult to understand" how the Applicant could have inadvertently taken the computer as she claimed. The JDC pointed to two pieces of evidence to explain how it reached this conclusion. First, it noted that a colleague testified that the laptop was not part of the training materials used during the trip and that laptops were never used during the training session. However, the Tribunal considers that this finding mischaracterizes testimony given by a colleague to the JDC and in a written statement. In fact, the Applicant's colleague stated that she herself never used a laptop for training sessions because her computer skills were inadequate, but that "[the Applicant] was responsible for using the laptops to prepare the handouts and

adjust the questionnaires in the provinces." She also stated that the Team's office in Phnom Penh had five laptops. These facts lend support to the Applicant's assertion that she inadvertently took the laptop from the Svay Rieng Province, mistaking that computer for one belonging to the Phnom Penh office.

V. The JDC also found, in support of its conclusion that the Applicant could not have inadvertently taken the laptop, that "[i]t does not seem difficult to notice a laptop, which has some weight, and an adaptor being packed with all other documents." The Tribunal agrees with the JDC that it would be difficult for the Applicant to claim that she did not notice packing a laptop with other UN materials. However, the Applicant did not make such a claim. Rather, the Applicant fully acknowledged that she took the laptop and consciously packed it among the other UN materials, but disputes the JDC's conclusion that she took the laptop with the knowledge that it belonged to the Svay Rieng Office. The Applicant maintains that she took the laptop in the belief that it belonged to the Phnom Penh office.

VI. The Tribunal next examined the JDC's conclusion that, by admitting that she took the computer "for [her] own personal use in [her] house", the Applicant confessed to stealing the laptop. The Applicant denies having made this statement. Moreover, though she asserts that, when she told the police that she had made a "mistake" by taking the laptop, she was referring only to a factual "mistake" regarding the ownership of the laptop and not the moral "mistake" of theft, as the police investigators and the JDC concluded. The Tribunal is dissatisfied with the thoroughness of the police investigation and report with respect to this alleged confession. It notes that language difficulties may account for confusion in the investigation and the JDC hearing.

The Tribunal is concerned by the fact that the Applicant signed the police report dated 4 May 1993, in which she stated that she took the laptop for her personal use. However, the Tribunal is equally concerned that the police admitted to forging her colleague's signature on a police statement. The Tribunal accepts the undisputed fact that her colleague later verified the accuracy of the forged statement but does not consider that this removes suspicion from the manner in which the police conducted their investigation. The record provides no explanation why or how the signature came to be forged, and the Tribunal holds that such a serious violation of proper procedures taints the integrity of the process by which the Applicant was found guilty and punished.

VII. The Tribunal finds that several facts lend support to the Applicant's claim that she took the laptop inadvertently. For example, it is uncontested that the laptop was placed among other UN materials inside rattan bags purchased by the Applicant and her colleague for the very purpose of carrying UN materials back to the Phnom Penh office. Two of the Applicant's colleagues verify that the rattan bags were purchased for this purpose and that no personal items were packed in the bags, but were instead kept separate from all UN materials.

VIII. Furthermore, both the Applicant and her colleague emphasized the stressful conditions surrounding their training sessions in Svay Rieng and their departure on 1 May 1993. The team had been travelling for several months conducting training sessions; violence and death punctuated the training session in the Svay Rieng Province; and the tension was aggravated by a verbal confrontation between the Applicant and the Provincial Electoral Officer (PEO) over materials needed for the training session. The JDC accepted that the Applicant was under stress at the time she took the laptop. It also observed that stress may have caused the

Applicant not to consider whether she had anything to do with an item missing from the Provincial Electoral Office when the police stopped the team and informed them that they were looking for a missing item, and not to think about getting in touch with Svay Rieng immediately when she noticed a laptop computer in the rattan bags prior to the police stop. However, these observations apparently did not affect the JDC's conclusion that the Applicant intentionally took the laptop for her personal use. The JDC conceded the impact stress may have had on the Applicant's decision-making ability, yet discounts her claim that she took the computer inadvertently. The JDC's observations strike the Tribunal as inconsistent with its conclusion.

IX. The JDC also emphasized her colleague's statement to the police indicating that she did not know about the laptop until the police stopped the car at the Neak Peon Ferry. The colleague's testimony at the JDC hearing and her statement to the Tribunal indicate that the Applicant <u>in fact</u> informed her shortly before they were stopped by the police that the Applicant may have inadvertently taken a laptop belonging to Svay Rieng. The JDC placed greater significance on a police statement with a forged signature than on the testimony before it. The JDC apparently concluded that the colleague's statement to the police, denying knowledge of the laptop until the car was stopped by the police, undermined the Applicant's claim that she realized she may have inadvertently taken the laptop and intended to call Svay Rieng upon their return to the Phnom Penh office. However, the later testimony, that the colleague was informed about the laptop prior to the police stop, would support the Applicant's claim.

The Tribunal places great weight on the colleague's testimony before the JDC and on a statement by the colleague submitted by the Applicant to the Tribunal that the Applicant did inform her that she believed she had mistakenly taken a laptop

belonging to Svay Rieng and that she would contact the Svay Rieng Office upon her return to Phnom Penh.

X. The Tribunal is also faced with conflicting reports on the circumstances surrounding the police stop at Neak Peon Ferry. The JDC noted that the Applicant refused to allow the police to search the car, that she did not immediately volunteer that she had the laptop upon being informed that the police were looking for a computer, and that she only offered the laptop after failing to reach the Svay Rieng Civpol commander and her own supervisor in Phnom Penh. However, the Applicant and her colleague both contend that the police originally informed them only that there was a telephone call for them, and did not mention until later the necessity of a car search. Upon being informed that their car would be searched, the Applicant admitted that she was concerned about the reason for the search and therefore tried to contact the Civpol commander in Svay Rieng and her supervisor in Phnom Penh for an explanation. The Tribunal does not find this concern to be unreasonable in the circumstances. The Applicant also stated that she was initially told that the police were looking for a "computer", and that she did not immediately make the connection between a computer and a laptop, but rather assumed that the police were looking for a desktop computer. Upon being informed that the police were looking for a "laptop", the Applicant gave the laptop to the police.

The Tribunal finds the details offered by both parties unclear about the sequence of events involved in the police stop. The Tribunal does not comprehend why the Applicant did not connect the missing "laptop" with the missing "computer" right away. However, the JDC itself concluded that stress may have contributed to this failure, and the Tribunal agrees. In the circumstances, the Tribunal finds that the Applicant's delay in turning over the

laptop to the police is not in and of itself proof of the Applicant's intent to conceal a "stolen" laptop.

XI. The Tribunal finds that the conclusions of the JDC, on which the Respondent based his decision of dismissal, either mischaracterized or failed to address certain evidence presented at the JDC hearing. The Tribunal attributes this inadequacy to a failure by the JDC to respect fully the requirements of due process. The Applicant alleges several due process violations that occurred immediately prior to and during the JDC hearing, including inadequate preparation time with counsel as a result of an improper referral to the station's Legal Office; inadequate time to prepare written comments and exclusion of those comments from consideration by the JDC; failure to address adequately allegations of bias concerning one of the JDC panel members; and consideration of hearsay evidence at the hearing. The Tribunal holds that the Applicant's lack of adequate time with her counsel to prepare a defense impaired her ability to present her version of events clearly and concisely and thus accounts for inconsistencies. The Tribunal also finds that the JDC's failure to admit the Applicant's written statements, despite the delay, was an error. Although the JDC was not required to accept the Applicant's comments, the short notice she was given for the presentation of her comments is a reasonable explanation for the delay in their arrival; these comments were critical in presenting her account of the incident. Because of these serious shortcomings in the JDC's proceedings, the Tribunal rejects the Respondent's claim that the Applicant is equitably estopped from raising due process claims because she waived them at the hearing.

XII. The Applicant's assertion that the JDC refused to dismiss a panel list for bias solely on grounds that they could not locate a replacement panel list would, if true, constitute a violation of

due process. However, as the Respondent points out, the grounds for the Applicant's allegation of bias were vague and she presents no evidence in support of her claim. Accordingly, the Tribunal finds that there was no due process violation with respect to the JDC's refusal to remove a panel member.

XIII. The Tribunal is also concerned by the JDC's reliance on a prosecution witness who testified to hearsay. According to staff rule 110.7, the JDC shall normally rely on written presentations and may require the testimony of witnesses either through written deposition, personal appearance, or some other form of communication. However, the testimony of a third-hand witness to the alleged incident does not constitute the kind of reliable evidence needed to overcome the problems that marked this incident from its inception. The Tribunal is left to wonder why the District Electoral Supervisor of Svay Rieng Provincial Town who reported the incident to Civpol, or the staff member who originally reported the theft, or the police officers who investigated the incident and who took the statement of the Applicant and her colleague, did not themselves testify as they would have had been able to fill in the missing details of the incident. The JDC was also unable to ascertain the credibility of the Applicant's accusers since they did not testify - a pivotal point in a case which relies so heavily on disputed facts. Against this third-hand witness stands the testimony of the Applicant's colleague, who was present at both the incident and the investigation and who stated both at the JDC hearing and in her statement to the Tribunal that she believes the Applicant did not take the laptop intentionally.

XIV. The Tribunal respects the JDC's authority to conduct investigations into disciplinary matters and to make recommendations to the Secretary-General. The Tribunal also respects the Secretary-General's authority to exercise his

discretion in defining serious misconduct and in determining appropriate penalties. However, the Tribunal will affirm the Respondent's exercise of discretionary authority only when satisfied that the underlying allegation of misconduct has been proven through a procedure that respects due process and that is not tainted by prejudice, arbitrariness, or other extraneous factors. The Tribunal is not convinced by the proceedings that the Applicant was guilty of theft, and consequently was dismissed, in accordance with due process. The Tribunal is skeptical of the thoroughness and accuracy of the investigation and alleged confession. The Tribunal also finds that any due process violations that may have occurred at the investigation stage were not adequately corrected at the JDC hearing because of further shortcomings in due process at the hearing.

XV. The Tribunal cannot conduct an investigatory proceeding ab initio. Furthermore, as the Applicant is no longer in the service of UNTAC, the disciplinary matter cannot be remanded for final resolution. However, the Tribunal finds that the Applicant's due process rights were violated and she was not given the benefit of the doubt on her alleged theft. She is therefore entitled to compensation which the Tribunal assesses at six months of her net base salary at the rate in effect on the date of her separation from service.

XVI. For the foregoing reasons, the Tribunal orders the Respondent:

(1) To pay to the Applicant six months of her net base salary at the rate in effect on the date of her separation from service.

(2) To expunge the report of the JDC and the Secretary-General's decision and any references to either from the Applicant's file.

The Tribunal rejects all other pleas.

(Signatures)

Samar SEN
Vice-President, presiding

Mayer GABAY
Member

Deborah Taylor ASHFORD
Member

Geneva, 25 July 1997

R. Maria VICIEN-MILBURN
Executive Secretary